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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 405

SATIRIS G. FASSOULIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM F. HAMILTON,
Attorney for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the above named petitioner for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered on July 19, 1961, affirming the judgment of conviction for violation of Section 1343, Title 18, United States Code, entered in the United States District Court for the Southern District of New York, on November 1, 1960, after a trial before Judge Irving R. Kaufman, without a jury, respectfully shows to this honorable Court:

Opinions Below

The statement of the District Court at the close of the trial is set forth as an appendix to the opinion of the Court below, which was filed on July 19, 1961, and is not yet reported, either officially or unofficially, and for convenience said opinion is appended to this petition as Appendix I.

Judge Dimock's opinion on the denial of petitioner's motion to dismiss the indictment for failure to accord him a speedy trial under the Sixth Amendment is published in 179 F. Supp. 645 (28a-32a).[1] Judge Metzner's decision on the motion to dismiss for lack of jurisdiction is printed in the Appendix (49a-51a).

A copy of the judgment of the District Court, affirmed by the Court below, is also set forth in the Appendix (380a).

Basis of Jurisdiction of Court of First Instance

The basis for federal jurisdiction in the court of first instance, asserted by the respondent, is by way of indictment under United States Code, Title 18, Section 1343, hereinafter set forth at length.

Statement of the Grounds Upon Which the Jurisdiction of This Court is Invoked

The date of the judgment of the Court of Appeals sought to be reviewed and the date of its entry are July 19, 1961. A motion for rehearing was filed on August 3, 1961, and was denied by order dated August 14, 1961.

An extension of time within which to file a petition for writ of certiorari was sought by petition filed on September 5, 1961, but said petition was denied by this Court on the same day, and upon moton for reconsideration on September 8, 1961, was again denied on September 9, 1961.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 of the United States Code, Section 1254(1). Rule 19 of the Revised Rules of this Court is applicable.

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[1] All references in parentheses are to Appendix as printed in the court below.

Questions Presented for Review

1. Whether the Court below erred in upholding the District Court's denial of the motion to dismiss the indictment on the ground that the Government denied petitioner a speedy trial by delaying the indictment of petitioner for a period of three years and nine months in violation of the Sixth Amendment.

2. Whether there has been a fatal variance between the indictment and proof, as the indictment alleges Liftig to be the victim whereas the proof was offered to show that the four corporations, for whom Liftig acted as agent, were the intended victims.

3. Whether petitioner did "unlawfully, wilfully and knowingly cause to be transmitted in interstate commerce, by means of interstate wire," certain sounds for the purpose of authorizing a loan against hypothecated debentures without evidence that petitioner made such telephone call or directly or indirectly "aided, abetted, counseled, commanded, induced, or procured" another to make such interstate telephone call. (See Title 18 U. S. Code, Section 2a.)

4. Whether the new so-called wire-fraud statute, Title 18 United States Code, Section 1343, never before interpreted or construed by this Court, can be extended to include sounds caused to be transmitted through a telephone over an interstate wire for the purpose of "attempting" to execute an alleged scheme to defraud where the alleged scheme was admittedly never executed, and the statute explicitly limits the purpose to "executing a scheme to defraud."

5. Whether petitioner should be convicted for acts that may constitute a crime under a statute that became law on July 11, 1956, when said acts were allegedly committed prior to the enactment of said statute, i.e., during the months

of October, November and December, 1955, and the alleged interstate telephone call relied upon was made on or about December 15, 1955.

6. Whether Federal jurisdiction can be established by attempting to prove the interstate character of the telephone conversation by circumstantial evidence of such nature that the colloquists could be inferred to be in the same state as easily as in different states so that every hypothesis except that of the petitioner's guilt, under the well established rule, is not excluded.

7. Whether the stricter standards of proof of intent to defraud heretofore recognized by all courts should not have been followed by the Court below.

Constitutional Provisions, Statutes and Federal Rules Which the Case Involves.

Constitution, Article I, Section 8, Clause 3, confers upon Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

The Sixth Amendment to the Constitution (the pertinent part) provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *."

The Fifth Amendment to the Constitution (the pertinent part) provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

Section 1343, Title 18, United States Code, after the amendment* of July 11, 1956, c. 561, 70 Stat. 523, provides:

> "Fraud by wire, radio, or television
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Rule 31(c) of the Federal Rules of Criminal Procedure provides:

> "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

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* Section 1343, Title 18, United States Code (before the July 11, 1956 amendment), in force at the time the crime in the case at bar is alleged to have been committed, provided:

> "Section 1343. Fraud by wire, radio or television.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, Sec. 18(a), 66 Stat. 722."

Statement of Case

The essential facts[1] are as follows:

In the District Court, having been tried without a jury before Judge Irving R. Kaufman between October 3 and October 11, 1960, the petitioner was adjudged guilty of the offense of unlawfully transmitting and causing to be transmitted by interstate telephone certain sounds for the purpose of executing a scheme to defraud under the so-called wire-fraud statute, Title 18, Section 1343, United States Code, and sentenced to imprisonment for a period of two (2) years (380a). This judgment was affirmed by the Court below on July 19, 1961.

Petitioner was apprehended on or about December 28, 1955, pursuant to a warrant issued upon a complaint filed with the United States Commissioner for the Southern District of New York, charging the above offense. On January 11, 1956, petitioner waived examination before the United States Commissioner, and was held to await the action of the Grand Jury. Meanwhile, petitioner was released on bail in the sum of $25,000, later increased to $50,000, after sentence by the District Court, and has been at liberty since that time (18a, 29a, 381a). On September 8, 1961, petitioner's motion was granted by the Court of Appeals to continue bail, until the final disposition of the case by this Court.

Over three years and nine months passed before an indictment was returned against petitioner on October 1, 1959.

Petitioner pleaded not guilty on October 16, 1959, and upon his request, the case was adjourned to November 4, 1959 (19a, 29a).

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[1] Petitioner has filed with this petition nine copies of the appendix as printed for the use of the Court below and the references herein are to said record.

Almost immediately thereafter on October 30, 1959, petitioner moved to dismiss the indictment on the grounds: (1) that he had not been accorded the right to a speedy trial to which he was entitled under the Sixth Amendment to the United States Constitution; and (2) unnecessary delay on the part of the Government in presenting the charge against petitioner to a Grand Jury in violation of Rule 48(b) of the Federal Rules of Criminal Procedure (16a).

Judge Dimock denied this motion upon the ground that, even though no demand for a speedy trial could be made until an indictment, petitioner always had the right to move to dismiss the complaint. This, petitioner had not done (28a, 30a). A motion for reargument was denied (41a).

At the ensuing trial, Judge Kaufman found petitioner guilty of devising and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from one A. Mitchell Liftig, and the use of the interstate telephone communications as a part of said scheme and artifice in violation of the wire-fraud statute.

The charge that petitioner caused an interstate telegram to be sent was abandoned at the trial because the alleged wire was sent only after the entire transaction was completed (234a, 273a, 274a, 354a). The District Court failed to mention the telegram but the Court below mentioned it in spite of its *ex post facto* character (See *Kann* v. *United States*, 323 U. S. 88 (1944)).

The charge that petitioner devised a scheme to defraud the two banks involved in the alleged telephone communication was also abandoned.

At the trial, there was no direct evidence that petitioner devised or intended to devise a scheme to defraud the alleged victim, Liftig. Nor was there direct evidence of

the interstate character of the alleged telephone call. Findings were pieced together by building inference upon inference without the required basic foundation of proof.

First, concerning the alleged scheme to defraud, the scheme proved by the testimony was one to enable petitioner to recover the control of a vessel he believed to be profitable, the S.S. Whitehead, and the common stock of the Whitehead Steamship Company which owned said vessel. The testimony shows that petitioner made several representations concerning charter negotiations for the Whitehead in order to impress Fox who controlled the Whitehead stock, as Fox, being in financial distress, was threatening to dispose of the stock, or the vessel, and petitioner sought to "stall" Fox (294a, 295a). Even Liftig, the Government's own witness, admitted that charters were shown to him for this purpose when he testified: "That was to satisfy Fox that something was happening, more than information for me" (86a). Fox was closer to Liftig than to petitioner, having known him "longer and better" than petitioner (308a), and Fox was telephoning Liftig four times per day on this subject (79a). Therefore, Liftig served as a pipeline to Fox.

But the burden of the Government's case was that these representations were intended solely for Liftig in order to induce a merger of all the stock of the Whitehead Steamship Company, when regained by petitioner, with four Connecticut companies in which Liftig claimed he owned from twenty to thirty per cent of the stock. As pointed out in Point II, *infra*, the Courts below, however, constantly fell into the error of calling them "Liftig's four companies." Liftig testified, over objection, that he had authority to make a deal for these four companies and "bring it back for the approval of the others" (the other stockholders, his two brothers and three other individuals) (60a). He therefore purportedly held himself out as having authority to act as agent for the four companies. If we

accept Liftig's testimony, as we must, he is an agent of the four companies and any alleged representation was made to him in a representative capacity, not to him as an individual.

Liftig claimed that he made a merger proposal along the above lines to petitioner upon the condition that the Whitehead be recovered and that it be chartered for $10,000 per month (62a, 74a, 124a). The charter was immaterial, however, as the vessel was already chartered for that amount (73a, 279a) and there would be no trouble obtaining a new charter for such amount (188a). Therefore, representations along this line were immaterial.

Liftig had a plan for a public issue of the corporation resulting from the proposed merger, using a corporate shell called Continental Chartering & Shipping Corporation (herein referred to as "Continental").[1] The whole merger plan, the proposal, and the initiative came from Liftig. There is no evidence that petitioner said or suggested anything (190a, 276a, 277a). The testimony varied as to how the stock of Continental was to be divided after the merger (62a, 125a, 127a, 280a).

As a matter of fact, no agreement was alleged or proved between petitioner and Liftig (126a). It was not shown that petitioner even accepted Liftig's proposal. There was little reason for petitioner to do so as the four companies needed financing (70a, 114a) and no balance sheet or earnings statement was ever produced; and the public financing was never accomplished (202a, 204a).

Indeed, the affirmative testimony shows that petitioner rejected Liftig's proposal as the four companies would only serve to "clutter up" Continental (276a, 277a, 279a, 281a). Petitioner said flatly that he "didn't want them" (282a).

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[1] Although alleged in the indictment, there is no proof that Continental belonged to petitioner.

The Whitehead's sound value was proved (106a, 123a, 186a, 284a). However, the value of the four companies does not appear anywhere in the testimony.

In any event, the whole scheme to acquire or merge with the four companies was, according to the testimony of all the Government's witnesses in the case, including Liftig, completely abandoned after the public financing plan failed and well before the Whitehead stock was finally transferred to Continental (114a, 115a, 116a, 193a, 287a).

The only remaining testimony of importance revolves around the deal with one James Eichler, who was interested in the purchase of the S.S. Amerosia, a second vessel offered to Continental, and two charters with Alcoa, one on the Whitehead and one on the Amerosia, as well as the rechartering back of the Whitehead. Eichler was to buy all the stock of the Whitehead Steamship Company, turn over all said stock to Continental and bareboat charter the Whitehead back to Continental for $10,000 per month for 40 months (77a, 140a, 141a). Eichler was also to buy all the stock of the Amerex Steamship Corp. and the two Alcoa charters (141a). As finally worked out, Continental was to obtain a loan of $350,000 to acquire the Whitehead stock by hypothecating 346 American Telephone & Telegraph Company ("A.T.&T.") debentures to be obtained from Eichler (77a, 81a, 145a, 147a). Such loan was worked out and petitioner arranged for the delivery of the A.T.&T. debentures by Eichler. There is no proof that petitioner knew that these debentures were counterfeit. This was discovered later when the entire transaction was rescinded, at no loss to any one, and petitioner himself was most insistent that the debentures were counterfeit, being the initiator of the investigation (101a, 123a, 130a, 164a, 190a, 290a).

At the time of this loan and the acquisition of the Whitehead, petitioner was neither an officer, director nor stock-

holder of Continental. Liftig was president and had full control. Petitioner had nothing to do with the closing of the loan of $350,000, which was handled by Moraites (170a, 171a), or the acquisition of the Whitehead, which was handled by Moraites and Liftig.

At this time, there was no further mention of the four companies. Neither petitioner nor Liftig said anything about these companies, or their acquisition by Continental (117a). Obviously, the whole matter had been dropped long before. There is no proof then of any intent to deceive Liftig or deprive him of any property. There was no proof that Liftig ever parted with or expected to part with anything upon any representation of petitioner. The proof, on the contrary, showed that no one lost any money (223a, 224a, 225a, 227a, 297a). Furthermore, petitioner knew then as well as at all times theretofore that Liftig would not be deceived as he had full control and knowledge and since petitioner did not intend to persuade Liftig to part with anything, petitioner could not be held to have intended to defraud Liftig or obtain his money by false pretenses or representations. Moreover, any alleged representations were made to the four companies, whose assets were allegedly sought, through Liftig as an agent, and not to Liftig as an individual.

Moreover, the testimony adduced by the Government did not endeavour or purport to show the respective physical locations of the telephone communicants at the time of the alleged interstate telephone conversation between the officers of the two banks involved, upon which Federal jurisdiction depends in this case, under the wire-fraud statute. Instead, the Courts below drew inferences as to the interstate character of this conversation with absolutely no supporting evidence. The same is true of the *ex post facto* telegram which was no longer considered as pertinent on this issue by the trial court.

In summary, the record is barren of the precise testimony required to support a conviction in the following respects in that there is:

1. No testimony of any material misrepresentation, that is, concerning the value of the Whitehead or of the Continental stock, after the acquisition of the Whitehead stock, for which the four companies were to transfer their assets to Continental, or merge with Continental in consideration of forty per cent of Continental's stock.

2. No testimony of any fraudulent representations made to Liftig as an individual, but only to Liftig in his representative capacity, as an agent of the four companies.

3. No testimony that Liftig was to transfer assets of, or merge, the four companies based upon any of the alleged misrepresentations concerning

a) The Alcoa charters,

b) The acquisition of the S.S. Amerex and S.S. Amerosia,

c) The Eichler deal involving the A.T.&T. debentures,

d) or any other alleged misrepresentations made by petitioner.

4. No testimony that petitioner ever requested Liftig to transfer the assets or the shares of the four companies to Continental, or that Liftig ever requested petitioner to agree to such a transfer, either before or after the acquisition of the Whitehead stock on December 16, 1955 (117a), or that Liftig ever parted with or intended to part with or was intended to part with anything of value.

5. No testimony that the petitioner ever made or "caused" to be made, the alleged interstate telephone call or "aided, abetted, counseled, commanded, induced or procured" another to make such call.

6. No testimony showing the interstate character of the telephone conversation relied upon to establish that there was a Federal offense.

7. No testimony that petitioner gained anything or ever would gain anything of value as a result of any alleged misrepresentations by petitioner.

Argument Relied Upon for the Allowance of the Writ

The Court of Appeals for the Second Circuit has decided important questions of Federal law which have not been but should be settled by this Court, or which are in conflict with decisions in other circuits, or of this Court, as follows:

POINT I

The petitioner has been denied his right to a speedy trial under the Sixth Amendment to the Constitution.

Over three years and nine months passed by between the date of petitioner's arraignment on December 28, 1955, accused of wire fraud, and his indictment on October 1, 1959. Obviously, such a long period can result in great prejudice and prejudice is generally presumed without proof on the subject being required. *United States* v. *Lustman,* 258 F. 2d 475 (C. C. A. 2nd, 1958), cert. den. 358 U. S. 880; *United States* v. *Provoo,* 17 F. R. D. 183, 203 (D. C. Md., 1955), affirmed 350 U. S. 857 (1955).

Petitioner contends that he moved promptly to dismiss the indictment after issue was joined by his plea of not guilty made October 16, 1959, at which time he was granted time to make motions until November 4, 1959.

Petitioner raised the question of the Sixth Amendment in the first instance by motion dated October 30, 1959.

Judge Dimock held that petitioner could have moved to dismiss the complaint against him at any time. Having failed to do so, he must be deemed to have waived his right to a speedy trial without even discussing petitioner's rights under the Sixth Amendment (29a). The same was held true of petitioner's rights under Rule 48(b).

Under the Sixth Amendment, the "accused" is entitled to a "speedy trial". And the Fifth Amendment prohibits the deprivation of liberty without due process of law, and the detention of a person for an infamous crime, "unless on a presentment or indictment of a Grand Jury".

Judge Dimock erroneously confused a rule of criminal procedure (Rule 48) with an express provision of the Constitution.

The Sixth Amendment provides that every accused shall enjoy the right to a "speedy and public trial". The provisions of this amendment are mandatory. Upon a showing by an accused that the Government has failed to grant him a speedy trial, a court must follow the mandate of the Sixth Amendment and dismiss the indictment for failure to give the accused a speedy trial.

This is not so, however, with respect to Rule 48(b) of the Rules of Criminal Procedure.

The word "may" as used in Rule 48(b)[1] indicates that the rule is discretionary. But no rule can abrogate, modify or nullify the Constitution. Rule 48(b), if interpreted to do so, would be unconstitutional to that extent.

In effect, it has been held by the Courts below that, contrary to substantial authority in this same Circuit and in other Circuits and even under the principles hitherto

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[1] "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court *may dismiss the indictment, information or complaint.*" (Italics ours.)

announced by this Court, inaction and silence by an accused will debar him on the ground of waiver of his constitutional rights.

Even in the Second Circuit, inaction heretofore did not spell out waiver of a fundamental constitutional right. In the *Lustman* case, relied upon below, the court referred to *United States* v. *Kaye*, 251 F. 2d 87 (C. C. A. 2d, 1958), where no mention was made by the defendant at or before the trial of a dismissal because of delay. This was pointed out by Judge Weinfeld[1] in *U. S.* v. *Dillon*, 183 F. Supp. 541, 543 (S. D. N. Y., 1960), who held it to be the duty of the public prosecutor to observe the constitutional mandate guaranteeing a speedy trial and that failure of the defendant to move to dismiss did not constitute a waiver of fundamental rights, citing *Glasser* v. *United States*, 315 U. S. 60, 70.

And we have substantial authority in other Circuits that waiver of the constitutional right to a speedy trial cannot be so lightly inferred.

In *Taylor* v. *United States*, 238 F. 2d, 259 (App. D. C., 1956), the defendant was apprised originally that he was

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[1] In *United States* v. *Brown*, 188 F. Supp. 624 (S. D. N. Y., 1960), the same judge pointly said (p. 626):

> "While there is respectable authority to support this position [citing in a footnote *United States* v. *Fassoulis*, 179 F. Supp. 645, Judge Dimock's opinion in the case at bar, and referring to the *Lustman* case], this Court is not prepared to accept its implication that a constitutional right may be forfeited by inaction rather than by affirmative and intentional waiver or relinquishment. The constant rule adhered to by the Supreme Court requires that courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" (Bracketed matter supplied.)

Judge Weinfeld then cited *Emspak* v. *United States*, 349 U. S. 190, 198 (1955).

accused, but an indictment issued three years later without his knowledge while he was incarcerated in New York. There was no showing that defendant knew he was indicted until two years later. The court dismissed the indictment, and held that defendant, by his inaction, did not waive his constitutional right. Along similar lines is the case of *Fouts* v. *United States*, 253 F. 2d 215 (C. C. A. 6th, 1958).

In *United States* v. *McWilliams*, also in the District of Columbia, 69 F. Supp. 812 (D. C., 1946), where the delay was only two years, the court said (p. 815):

> "As in all long delayed cases, the witnesses now are scattered; some are not accessible, more particularly to the defendants who are without funds; the memories of witnesses as to events occurring many years ago are not clear. * * * I do not see how these defendants now can possibly obtain fair trials."

In *United States* v. *Chase*, 135 F. Supp. 230 (N. D. Ill., 1955), where the indictment was dismissed, the court analyzed the cases holding a speedy trial is waived if no positive demand is made, stating (p. 231):

> "Analysis of them, however, shows that each involved an action in avoidance or delay of trial more positive than mere silence or inaction."

Mere knowledge, held the court, could not be equated with acquiescence.

Certainly, petitioner could not know if he would ever be brought to trial.[1]

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[1] In *People* v. *Prosser*, 309 N. Y. 353 (1955), the Court said (p. 360):

> "In this case, not only was there never an application for a postponement in court or upon notice to the defendant, but there was absent even an awareness that the prosecution was being kept alive or that a trial would eventually be had, cf. People v. Perry, 196 Misc. 922, supra, without which there would be no factual basis for inferring consent or waiver."

The right to a speedy trial is a "fundamental" one provided by the Constitution. In *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), this Court said, quoting from previous authorities (p. 464):

> "'* * * courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and * * * we 'do not presume acquiescence in the loss of fundamental rights'."

The right goes back to that first charter of rights, the Magna Carta, which stated:

> "To none will we deny or delay, right or justice."
> (For a recent translation of Magna Carta, see Ottenberg, Magna Carta Documents).

An examination of the entire affidavit submitted by the Government in opposition to the motion to dismiss fails to disclose a single allegation explaining or tending to explain why a delay of three years and nine months ensued before the indictment against petitioner was filed (22a-25a).

There is no analogy between a motion to dismiss the indictment and one to dismiss the complaint.

In the case of an indictment, the prosecution has marshalled its evidence and witnesses and is ready for battle. The charge has become triable. From then on defendant's vigilance is as important as the prosecution's. It is easy for an accused to follow the case and determine whether delay is due to pure neglect. If it is, the accused has his remedy by motion. And the cases so hold. And petitioner made his motion here promptly after indictment.

But this is not so in the case of a mere complaint. There may be any number of reasons why the charge is not submitted. These reasons could be uncovered only by motions to dismiss from time to time. In no case could the movant determine, however, whether there was an "unnecessary delay" or any ground for his motion. And the movant's papers would be subject to attack because of such deficiency

Moreover, an indictment indicates that a charge has been upheld but a complaint is nothing more than an incipient accusation. In the latter case, an accused could assume rightfully, in the case of delay, that the marshalled evidence failed to persuade the Grand Jury.[1] He could safely indulge in the conclusion that he might never be indicted. Then, if, after being lulled into security by the passage of an inordinate span of time, the accused is indicted, it would seem that the prosecution, not the defendant, should have some burden to explain the delay.

Therefore, even if there were basis for penalizing a defendant for not moving to dismiss after an indictment is pending for some time, the same basis does not hold while only a complaint is pending which may never ripen into an indictment.

It is conceded in all courts that, prior to indictment, petitioner had no right to move for a speedy trial. He would not and could not know if an indictment would ever issue. And when it did issue on October 1, 1959, petitioner promptly moved to dismiss on October 30, 1959.

One is "accused" when the complaint is made. This was on December 28, 1955. From then on, according to the Courts below, petitioner was charged with a duty of affirmative action if he desired to protect his right to a speedy trial.

The United States Attorney, representing the Government, is not required by law to have a complaint before a United States Commissioner, or have an accused waive examination or, if the accused has an examination, have the Commissioner hold an accused to await the action of a Grand Jury before he can present a case before a Grand Jury. The United States Attorney may go directly before a Grand Jury, secure an indictment and have a warrant issued for the arrest of an accused upon the warrant.

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[1] As a matter of fact, the record shows that Fox appeared before a Grand Jury on April 24, 1959 (308a), and no indictment was filed until October 1, 1959.

Petitioner urges that a dismissal of a complaint does not constitute a trial and an adjudication.

Even if petitioner had made a motion to dismiss the complaint, or moved to discharge the bail which would not be a dismissal of the complaint, petitioner would still be in the same position as before the dismissal of the complaint or the discharge of the bail since the United States Attorney would still be able to proceed before a Grand Jury. U. S. Code, Title 18, Sections 3288, 3289.

In *Smith* v. *United States*, 360 U. S. 1, 10 (1959), this Court said:

> "* * * Moreover, if, contrary to sound judicial administration in our federal system, arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment."

Petitioner urges that a delay of three years and nine months before an indictment is secured by the Government is an "inordinate delay" prior to indictment, and that having moved promptly to dismiss the indictment secured by the Government after such a delay, he is entitled to a dismissal of the indictment pursuant to the provisions of the Sixth Amendment.

POINT II

There has been a fatal variance between the indictment and the proof.

The indictment charges that defendant, as a part of his scheme to defraud Liftig, promised "if the aforementioned A. Mitchell Liftig would contribute certain assets owned by him to the Continental Chartering & Shipping Corporation, a corporation owned by the defendant, the defendant would in turn contribute the S.S. Amerosia and the S.S.

Whitehead, and the aforementioned charter parties with Alcoa for these vessels" (6a, 7a).

The Government failed to prove that Liftig owned the assets which were the subject matter of their alleged negotiations.

Liftig stated that he had the "authority to make a deal and bring it back for the approval of the others" (60a). He could do nothing on his own initiative. In other words, according to the Government's testimony, Liftig did not own the assets and could do nothing with them, contrary to the indictment (59a, 60a). However, accepting the testimony as we must, Liftig was acting only in a representative capacity, that is, on behalf of the four companies. Therefore, any alleged false representations were made to Liftig only in his capacity as agent for these companies.

Furthermore, according to the Government's proof, it was not Liftig's assets that were involved. He only owned a minority interest in the four companies (60a). The testimony of Liftig[1] is that these four companies would be merged in return for 40% of the stock of Continental (62a).

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[1] "Q. If Whitehead were put in a corporation? A. A new corporation.

Q. Was that to be a corporation to be newly formed? A. Yes, sir.

Q. You mean the Whitehead stock? A. Yes, which was what he was getting back.

"By Mr. Hyde:

Q. Would you continue? A. Then the four companies would also be put into that corporation.

"By the Court:

Q. You mean stock of the four companies would be put into the corporation? A. Yes, sir.

Q. What would the corporations get in return? A. Forty per cent of the stock."

Liftig was acting as an agent for four corporations. They would be the intended victims and the alleged false representations were made to the four companies through Liftig as such agent, and not to Liftig as an individual. But there is no charge in the indictment that petitioner ever intended to defraud the four corporations. The indictment charges that the representations were made to Liftig to defraud him as an individual. Not a scintilla of evidence was adduced by the Government to support this allegation.

The Court below in its opinion states:

> "He says the proof must show that he intended to deprive Liftig of 'money or property.' We think that was shown. Liftig had a property interest in the four corporations which the appellant sought to merge with Continental, and, if the merger had been brought about by misrepresentations attributing fictitious value to the appellants proposed contribution to the merger, the effect necessarily would have been to deprive Liftig of the full value of his contribution to the merger."

The Court below is in error in making this finding from the evidence. The proof does not support any conclusion that petitioner was intending to defraud Liftig. The proof adduced by the Government was for the purpose of attempting to show that petitioner was interested only in the four companies, and not in Liftig's interest in them. Liftig, the evidence will disclose, was merely the agent of the four corporations. He did not negotiate in his individual capacity. The principals, the four corporations, were disclosed by the agent Liftig (59a). Thus, any representations were not made to deprive Liftig of any property but were made to the four corporations for whom Liftig was acting as authorized agent (60a, 61a).

The Court below mentioned "Liftig's corporations" on two occasions. The trial judge made the same mistake when

he constantly referred to "Liftig's four sound companies" and "Liftig's four companies" (347a-356a).

This finding by the Courts below is not substantiated by the evidence in the case. The corporations did not belong to Liftig. At most, Liftig owned 25% of the stock of Utica Manufacturing and Utica Wire (59a), 30% of Cameron, and 20% of Atlas (60a).

If the petitioner had known, however, that the corporations were the intended victims, rather than Liftig, the petitioner would have completely altered his preparations for trial.

The decision of the Court below denying there was a variance is in direct conflict with this Court's decision in *Stirone* v. *United States*, 361 U. S. 212 (1960), where the trial judge, in a case involving unlawful interference with interstate commerce under the Hobbs Act, permitted the introduction of evidence to show interference with the exportation from Pennsylvania of steel to be manufactured in a new plant, not charged in the indictment, as well as importation of sand, as charged in the indictment, and included both in his charge to the jury. This Court reversed the conviction under *Ex parte Bain*, 121 U. S. 1 (1887). "The *Bain* case," said this Court (p. 217), "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

The sufficiency of evidence to sustain a conviction must be judged with respect to the offenses actually alleged in the indictment. *Walker* v. *United States*, 104 F. 2d 465 (C. C. A. 4th, 1939).

In *Kutler* v. *United States*, 79 F. 2d 440 (C. C. A. 3rd, 1934, on rearg., 1935), the court held that a false description of a person in an indictment, where such description is essential, constitutes a fatal variance.

In the case at bar, there was a false description of the victim of the fraud in the indictment, constituting a fatal variance.

Certainly, the Court cannot permit a defendant to be tried on charges that are not made against him in the indictment. *Stirone* v. *United States*, *supra*.

In such a case, it is hardly necessary to examine the rule that a variance is prejudicial only if it misleads a defendant. *United States* v. *Rowe*, 56 F. 2d 747, 749 (C. C. A. 2d, 1932), cert. den. 286 U. S. 554.

Prejudice need not be shown by evidence. It is self-evident that petitioner was misled.

To intend to deprive four corporations of money or property, as attempted to be proved, is not an intent to deprive Liftig of any assets. The charge in the indictment and the proof are therefore fatally divergent.

POINT III

Petitioner did not "cause" the alleged false representations to be transmitted in interstate commerce by means of interstate wire.

Under the statute in question, Title 18, U. S. Code, Section 1343, a defendant, to be punishable, either "transmits or causes to be transmitted sounds for the purpose of executing" a scheme or artifice to defraud.

There are two elements: 1) the transmission; and 2) the execution of the scheme.

In the wire-fraud authorities examined, the defendant or an accomplice was a party to the telephone call in question and the scheme was executed. See *United States* v. *Hancock*, 268 F. 2d 205 (C. C. A. 2nd, 1959), cert. den. 361 U. S. 837; *Roberts* v. *United States*, 226 F. 2d 464 (C. C.

A. 6th, 1955), cert. den., 350 U. S. 935; *Rose* v. *United States*, 227 F. 2d 448 (C. C. A. 10th, 1955).

There is no proof that either petitioner or his accomplice participated in the telephone conversation at bar. The alleged interstate telephone call was placed on the morning of December 15, 1959, by Heller of the First National Bank of Akron, it not appearing where he was at the time, to Rommel of the Chemical Corn Exchange Bank in New York, for the purpose of arranging the loan to Continental against the hypothecated A.T.&T. debentures at the New York bank (218a, 230a, 231a) so that the Whitehead stock could be acquired with the proceeds of the loan. At the time of the conversation, petitioner was far removed from the scene and had no knowledge thereof. And he had not authorized nor was he responsible for the call being made. Petitioner's only act was to make the debentures available to Continental for hypothecation (77a, 81a, 145a, 147a).

Judge Kaufman, in holding that petitioner "caused" the false representations in question to be transmitted by means of interstate wire in interstate commerce, followed the test set forth in *Pereira* v. *United States*, 347 U. S. 1 (1954) (a mail-fraud case). In that case, this Court said (pp. 8, 9):

> "Where one does an act with knowledge that the use of mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used. *U. S.* v. *Kenofskey*, 243 U. S. 440."

In the *Kenofskey* case, this Court had said (also a mail-fraud case) (p. 443):

> "'Cause' is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey."

In both cases above cited, the defendant well knew that the documents surrendered would be placed in the mail by the recipient in the ordinary course of business. But no knowledge that the use of the interstate wire in interstate commerce would follow in the ordinary course of business is found in the record in the case at bar. Nor could such use reasonably be foreseen.

The evidence adduced at the trial concerning the custom of using the telephone between the two banks (237a) is not binding upon the petitioner. Petitioner was not shown to have had banking experience and therefore could not reasonably have foreseen such unusual practice. Such custom might be admissible between parties in a civil action but even in such case there would have to be some ground work to show that the party charged was in the habit of seeking closings of loans within twenty-four hours and had some knowledge or means of knowledge concerning the custom.

In the making of the arrangement for the loan of $350,000, the time when the money was to be paid under the loan contract was never agreed upon. Thus, when Continental delivered to Mr. Ortman of Blair & Co. the documents executed by Liftig and Moraites (150a) on December 14, 1955, there is no evidence that any one made it a part of the loan contract that the money was to be paid December 15, 1955. Time was not "of the essence".

Judge Kaufman was in error when he stated:

> "Thus it is clear that the telephone call was necessary for the defendant's plan to be realized since without it the loan could not have been obtained and the scheme would have failed."

There is no testimony to establish that unless the money was delivered on December 15, 1955, Liftig would have

broken off all negotiations with petitioner, and, as stated by Judge Kaufman, petitioner's scheme would have failed.

It, therefore, follows that Judge Kaufman's finding that "the defendant caused the call within the meaning of the statute" is erroneous and is not based upon any evidence adduced at the trial. Judge Kaufman cannot make a finding of fact unless such finding is based upon legal evidence.

Unless time was "of the essence" in closing the loan contract, use of the telephone could not reasonably have been foreseen by petitioner. Therefore, he cannot be held to have "caused" the transmission of sounds over the interstate wires.

Even Moraites, who handled the loan for Continental (170a, 171a) did not know the Chemical and Akron banks (in different states) were involved until December 14, 1955, the very day before the loan was effected (170a). And then he was expecting a wire to be sent from Akron to Chemical (172a). Nothing was said about any telephone call (although the indictment mentions both telephone and telegraph) (7a), the latter was dropped as the telegram arrived after the loan was completed (234a).

Any means of written communication might have and could have been utilized. In a transaction of this size, the average individual would expect some written record to be made before the loan was completed, not afterwards. Certainly, a telephone call would not be adequate unless tape recorded. How could it "reasonably be foreseen"?

The question remains whether one can "cause" a telephone call to be made when he has no control over either party to the call or the chain of events leading up to the call. Moraites initiated and carried on the loan negotiations (170a, 171a). Petitioner did not own stock in Contintental (97a, 180a) and was neither an officer nor a director thereof at the time (69a, 93a, 179a). Liftig and Moraites made the loan arrangements (90a, 91a, 150a).

Furthermore, there is a hiatus in the Government's proof and no causal connection between the alleged misrepresentations and the telephone call. There was no "scheme" on December 15, 1961, when the call was made. There was no continuity of unlawful purpose. All discussion of the four companies, for which Liftig was acting as an agent, had long since ceased (114a, 116a, 193a, 279a).

The case at bar is not unlike *United States* v. *Fox*, 95 U. S. 670 (1877). Obtaining goods on credit upon false pretenses was not made an offense against the United States until the happening of a subsequent event, namely, bankruptcy, which might not be in the contemplation of the party, and certainly might be brought about against his will through no act of his own.

In the *Fox* case, this Court said (p. 671):

> "* * * Upon principle, an action which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. But the clause in question, the obtaining of goods on credit upon false pretences is made an offence against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction."

Certainly no criminal intent to commit a Federal offense can be imputed to the petitioner from the independent telephone call of Heller to Rommel. There must be a "concurrence of an evil-meaning mind with an evil-doing hand". *Morissette* v. *United States*, 342 U. S. 246, 251 (1952).

POINT IV

The wire-fraud statute requires transmission of sound for the "purpose of executing a scheme to defraud": it does not cover the crime the government endeavoured to prove, namely, an attempt to defraud, and the federal courts have no jurisdiction over such offense.

There is no crime on the statute books such as the one of which appellant has been convicted. Petitioner, according to the judgment entered herein, has been convicted of having "unlawfully transmitted and caused to be transmitted by interstate telephone and telegraph certain sounds for the purpose of executing a scheme to defraud" under Title 18, Section 1343 of the United States Code, a statute never before interpreted and construed by this Court. However, the scheme to defraud alleged in the indictment was admittedly never executed and completed and the Government witness, Liftig, the alleged victim, admittedly never parted with anything based upon the alleged scheme to defraud (356a). Therefore, in reality, petitioner has been convicted of unlawfully transmitting by interstate telephone certain sounds for the purpose of "attempting" to execute a scheme to defraud under Section 1343 of the United States Code, not for the purpose of executing such scheme.

Section 1343 was patterned after Section 1341 of the United States Code, the so-called "mail-fraud" statute, which contains the words "for the purpose of executing such scheme or artifice or attempting so to do." However, the words "attempting so to do" were advisedly and purposely omitted from Section 1343 as an "attempt" would be an intrastate crime and not a Federal offense, inasmuch as the telephone (as well as the telegraph), contrary to the mail box, is a privately owned communication utility. Unless a crime were consummated affecting interstate com-

merce, there would be no offense. And in the case at bar we have no consummation.

An examination of the House Report, setting forth the original wire-fraud statute enacted on July 16, 1952, supports the conclusion that Congress purposely left out the phraseology "attempting so to do" in drafting the statute. H. R. 388, 82nd Congress, 1st Session, reported from the House Committee on the Judiciary in 1951.

In H. R. 388, Hon. Joseph R. Bryson, chairman of subcommittee No. 3 of the House Committee on the Judiciary, states pertinently as follows with respect to the new statute:

> "In principle it is not dissimilar to the postal fraud statute (U. S. C. 1341).
>
> "As we report the measure in amended form, it creates a new but relatively isolated area of criminal conduct consisting of the *execution* of a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises transmitted in writings, signs, pictures or sounds via interstate wire or radio communications (which includes the medium of television.)" (Italics ours.)

The proponents of the bill and the Committee recognized then that the crime must be *executed* in order to come within the prohibition of the statute.

The distinction between the mail-fraud and wire-fraud statutes and cleavage between Federal and State jurisdiction is emphasized elsewhere in H. R. 388. Concerning this distinction, the Report states:

> "Reliance by the Committee of the Commission on an analogy to a similar provision in the mail-fraud statute is not persuasive, since the mails are a Government instrumentality and control over them is derived

> from the post office clause of the Constitution and not the commerce clause, as is the case with the privately owned radio and wire communications industries."

In *United States* v. *Fox*, 95 U. S. 670, *supra*, this Court said, speaking of obtaining goods under false pretenses (p. 672):

> "But an act committed within a State, whether for a good or bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which State can alone legislate."

In the reported telephone cases examined, the schemes were all executed. *Roberts* v. *United States*, 226 F. 2d 464 (C. C. A. 6th, 1955), cert. den. 350 U. S. 935; *Rose* v. *United States*, 227 F. 2d 448 (C. C. A. 10th, 1955); *Hoffman* v. *United States*, 249 F. 2d 338 (C. C. A. 10th, 1957); *United States* v. *Hancock*, 268 F. 2d 205 (C. C. A. 2nd, 1959), cert. den. 361 U. S. 837.

Rule 31(c) of the Federal Rules of Criminal Procedure contemplates that the attempt must be expressly made a Federal offense. See *United States* v. *Lucas*, 6 F. 2d 327 (W. D. Wash., 1925).

In *Viereck* v. *United States*, 318 U. S. 236, 245 (1943), this Court held that one may not be "held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn". As there are no common law offenses against the United States, the rule requires strict definitions of crimes. *Pierce* v. *United States*, 314 U. S. 306, 311 (1941). See also *Winters* v. *People of State of New York*, 333 U. S. 507 (1948).

The intent of Congress in leaving out the words "attempt so to do" is obvious. Lack of Federal jurisdiction was recognized. Petitioner has therefore been convicted of a non-existent crime, one of causing sounds to be transmitted for the purpose of attempting to execute a scheme, rather than for the purpose of executing a scheme.

POINT V

The wire-fraud statute under which the indictment was framed was not in force at the time of the alleged crime.

The "scheme" was alleged in the indictment to have been devised "during the months of October, November and December, 1955", and it is averred that the "scheme" ripened on or about the 15th day of December, 1955. The indictment further alleges that the petitioner transmitted or caused to be transmitted sounds "in interstate commerce". However, in the year 1955 (and not until the amendment of Section 1343 on July 11, 1956), there was no such crime as "transmitting and causing to be transmitted (sounds) in interstate commerce" for the purpose of executing a fraudulent scheme. The earlier statute, enacted in July, 1952, did not even mention "interstate commerce." The crime therein defined prior to the amendment consisted of "transmitting or causing to be transmitted" "by means of interstate wire * * *." Therefore, the crime charged did not exist and was not even on the Federal statute books in 1955. In any event, Federal jurisdiction hinges upon a communication in interstate commerce, which was not covered by the statute as it was worded in 1955.

The applicable statute is the one in force at the time the alleged crime was committed. *Rosenberg* v. *United States*, 346 U. S. 273, 295, 296 (1953), reconsideration denied, 346 U. S. 324 (1953).

POINT VI

The respective physical locations of the telephone communicants were not established by the government, leaving the interstate character of the crime unproved by any direct evidence, a jurisdictional requirement which should be proved by clear and unmistakable direct testimony.

The Court below based its finding that there is no deficiency in the proof of the interstate telephone call:

> (1) Upon certain proof concerning receipt of a letter to the Bank in Akron dated December 14, 1955, after which a call was made by Heller of that Bank to Rommel of the Chemical Bank; and
>
> (2) Upon an *ex post facto* telegram, dated December 15, 1955, confirming a telephone conversation, directed to the Chemical Bank from Heller in Akron.

There is absolutely no evidence whatsoever that Heller was in Akron, Ohio, or in any state other than New York, or that Rommel was in New York when the telephone call in question was made. That Heller called the Chemical Bank when he received documents does not prove that Heller was in Akron. And that Heller "ordered" (219a) a telegram sent does not prove that he ordered it from Ohio or from any state outside of New York. Nevertheless, on this vital jurisdictional point, the Court below has seen fit to draw an inference upon an inference without any tangible support.

Proof of the interstate character of the telephone call was the most important element in the Government's case. No shadow of doubt should be left in proof of this vital element. Yet, doubt is created by the very fact alone that Government counsel avoided asking Heller where he was

at the time of the call. Why didn't Government counsel ask this simple question? From this failure, we can only draw an inference contrary to that so readily drawn by the Court below, namely, that Heller was not in another state at this vital time. The Government proved only that Rommel and Heller talked to one another on the telephone. Yet the Court below drew inferences making it an interstate conversation, upholding a conviction without the direct evidence so essential on the point the very jurisdiction of the Federal court depends.

An inference can be just as readily drawn that Heller was in New York when he telephoned Rommel from the failure of the Government's counsel to pose the question. Evidence consistent with two conflicting hypotheses proves neither. *Penna. R. Co.* v. *Chamberlain,* 288 U. S. 333 (1933). Such would clearly be insufficient to support a verdict of guilty.

Finally, the Court below erroneously held, contrary to the trial court: "Indeed, irrespective of the telephone call the proof of the telegram was enough to establish a communication by interstate wire." Here the Court below departed from established judicial process by making a new finding of fact.

If the telephone call is relied upon as an essential part of the Federal offense, the telegram must be disregarded by this Court as being *ex post facto* as Judge Kaufman ruled in the trial court. *Kann* v. *U. S.*, 323 U. S. 88 (1944) (where it was held that use of the mails after completion of a scheme is not a violation of the statute).

The jurisdiction of the Court below depended upon a Federal offense. This Court certainly would not sanction the use of inferences drawn from other inferences to show such an offense. In *Donnelley* v. *United States,* 276 U. S. 505, 511 (1928), it was held that the facts must show "plainly and unmistakably" that there is an offense within

the meaning of an Act of Congress. The Courts below, in resorting to inferences drawn from inferences, admitted that the facts constituting a Federal offense were not "plainly and unmistakably" shown.

POINT VII

The standards required by the courts below in the proof of fraud or intent to defraud are less strict than any heretofore recognized.

There was no direct proof by word or deed indicating any intent on the part of petitioner to defraud Liftig as an individual, as charged in the indictment, paragraphs 1, 2, 3 and 4 (5a-7a). The evidence, on the contrary, repels even an inference of any intent to defraud Liftig, as an individual. Generally, fraud must be proved by clear and convincing evidence, by evidence that is "irrefragable" and not open "to opposing presumptions." *Carpenter* v. *Providence Washington Ins. Co.*, 45 U. S. 185, 224 (1846).

Evidence as compatible with innocence as with guilt is insufficient to support a verdict of guilty. *Romano* v. *United States*, 9 F. 2d 522 (C. C. A. 2nd, 1925); *Neal* v. *United States*, 102 F. 2d 643, 648 (C. C. A. 8th, 1939). See *Penna. R. Co.* v. *Chamberlain, supra.*

The Courts below also ignored the basic rule that a misrepresentation to be fraudulent, must be as to a fact or a state of facts material to and the determining ground of the transaction involved, namely, in the case at bar, the acquisition of the Whitehead stock. See *Cooper* v. *Schlesinger*, 111 U. S. 148, 152 (1884); *Charles* v. *United States*, 213 Fed. 707, 712 (C. C. A. 4th, 1914); *Harrison* v. *United States*, 200 Fed. 662, 665 (C. C. A. 6th, 1912) (decided under the mail-fraud statute).

The Courts below have ignored the foregoing rules, cited in the petitioner's brief below, in upholding the petitioner's conviction.

SUMMARY

Thus, the decision below denied a fundamental constitutional right, made a highly questionable interpretation of an important statute of the United States having universal application, and is at variance with numerous decisions of this Court and courts in other circuits on questions of law of general importance that should be settled by this Court in their application to the case at bar in the interest of uniformity of decisions in the various circuits.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

WILLIAM F. HAMILTON,
Attorney for Petitioner,
743 Fifth Avenue,
New York 22, New York.

JOSEPH ARONSTEIN, Esq.,
of Counsel.

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 26684

No. 355—October Term, 1960.

(Argued May 22, 1961 Decided July 19, 1961.)

UNITED STATES OF AMERICA,

Appellee,

—v.—

SATIRIS GALAHAD FASSOULIS,

Appellant.

Before:

CLARK, HINCKS and WATERMAN,

Circuit Judges.

Appeal by the defendant Satiris Galahad Fassoulis from conviction after trial to the court in the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge*, of use of interstate wires for telephone and telegraph communications for the purpose of executing a scheme to defraud in violation of 18 U. S. C. A. §1343. *Affirmed.*

WILLIAM F. HAMILTON, New York City, *for appellant.*

DAVID R. HYDE, Asst. U. S. Atty., Southern District of New York, New York City (Robert M. Morgenthau, U. S. Atty., and George I. Gordon, Asst. U. S. Atty., S. D. N. Y., on the brief), *for appellee.*

HINCKS, *Circuit Judge*:

After trial from October 3 to October 11, 1960, before Judge Kaufman, a jury having been duly waived, the appellant was found guilty of having devised a scheme to defraud one A. Mitchell Liftig by means of false representations and having caused the transmission of a communication by interstate wire for the purpose of executing the fraudulent scheme. This appeal is from the resulting judgment of conviction.

The facts as he found them were set forth in a lucid statement by Judge Kaufman at the close of the trial.[1] This statement, since not elsewhere published, we will include in full as an appendix to this opinion. Without restatement or repetition, we will assume familiarity with the contents of that statement.

The appellant asserts—and rightly so—that to warrant a conviction the government had to prove beyond a reasonable doubt (a) that the defendant devised a scheme to defraud Liftig by means of false representations and (b) caused a communication by interstate wire for the purpose of executing said scheme. His main ground of appeal is that in several aspects such evidence was wanting. Thus he contends that there was no proof of an intent to defraud Liftig—that numerous false representations he had made to Liftig in the course of their business relations were in fact made in the hope of preventing Fox, his friend and creditor, from foreclosing on the Whitehead Company stock which he had pledged with Fox to secure his debt to Fox. The evidence, however, and especially the testimony of Liftig, Moraites and Purcell, fully warranted the inference that Liftig was the intended victim of a scheme to bring about a merger of four corporations in which Liftig had substantial interests with the hollow corporate

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[1] Previously, jurisdiction and venue had been sustained by Judge Metzner in an opinion reported in 185 F. Supp. 138.

shell of the Continental Chartering & Shipping Corporation then owned by the appellant and that, contrary to appellant's contentions, the loan by the First National Bank of Akron, Ohio to Continental on the security of $346,000 in American Telephone and Telegraph debentures (which shortly thereafter proved to be spurious) was brought about by the appellant, who had provided the debentures, for the purpose of executing said scheme. It is true that some of the testimony of the appellant's witness Fox tended to absolve the appellant of fraudulent intent. Nevertheless, there was ample testimony to support the underlying facts recited in the trial judge's findings and on these facts the inferences and conclusions reached were reasonable and, indeed, highly convincing. At the trial it was admitted that in the course of his dealings with Liftig the appellant in unsuccessful efforts to achieve the objective of the scheme had made several false representations and the falsity of still others was established by necessary inferences. It was reasonable to find that the loan from the Akron bank was still another such effort.

The appellant also attacks the sufficiency of the evidence to prove the making and the interstate character of the telephone call on December 15, 1955 by Heller of the Akron bank to Rommel of the Chemical Corn Exchange Bank at New York instructing him to pay to Continental $350,000 on the receipt of $346,000 face value A. T. & T. debentures. He contends that the evidence on this issue was inadequate in that Heller did not testify in detail as to the mechanics in placing the call and that neither he nor Rommel testified that either was able to identify the voice of the other as it came over the wire. But of course such testimony is not a requisite to the admissibility of the call when the parties at both ends of the line testify to the call. Perhaps somewhat more substantial is the appellant's objection that there was no evidence of the geographical location of each participant when the call went through from which the interstate character of the wire carrying the communication might

be determined. As to this, Heller testified that on the morning of December 15, "there was received by us" through Continental's loan broker Continental's note for $350,000, a certificate of the corporate vote authorizing the loan with a letter dated December 14 addressed to "First National Bank of Akron, Akron, Ohio," and that on December 15, after receipt of these papers covering the loan, he "called the Chemical Bank, Mr. Rommel." Especially in the context of his testimony followed by Rommel's, we think it reasonable to infer that he was in Akron when he had this telephone talk with Rommel at the Chemical Bank in New York. Moreover, there was in evidence both Akron's office copy of a telegram, also dated December 15, confirming the telephone conversation, which was expressly directed to the Chemical Bank, "NWYK," and Chemical's copy of this same telegram as received by Rommel, according to his undisputed testimony, via Chemical's main office at 30 Broad Street. We find no deficiency in the proof of the interstate character of the telephone call: it is corroborated by the written evidence of the telegram copies. The appellant cites McCormick on Evidence, pages 404 and 405. We find nothing in that text in conflict with our conclusions. Indeed, irrespective of the telephone call the proof of the telegram was enough to establish a communication by interstate wire within the purview of 18 U. S. C. A. §1343. Our conclusion is not vitiated by the fact that in the telegram, and perhaps in the telephone call, Continental was designated as "*Commercial* Chartering and Shipping Corp." The record makes it plain beyond the peradventure of any doubt that this was a clerical slip wholly without effect on any issue. Even the appellant made nothing of the point on trial or on his main brief on appeal.

In his main brief the appellant lists several other claims of error based upon alleged deficiencies of proof as to the incidents of the alleged fraudulent scheme all of which were overruled in the opinion below. He says the proof must show that he intended to deprive Liftig of "money

or property." We think that was shown. Liftig had a property interest in the four corporations which the appellant sought to merge with Continental and, if the merger had been brought about by misrepresentations attributing fictitious value to the appellant's proposed contribution to the merger, the effect necessarily would have been to deprive Liftig of the full value of his contribution to the merger. All the false representations proved and conceded, including the implied representation that the A. T. & T. bonds were genuine when the appellant provided them as collateral for Continental's loan, were material in that each tended to bring Liftig's corporations into the merger.

We agree with the court below that on the evidence it would have been naive to believe that the appellant did not know throughout that the A. T. & T. bonds he provided as collateral were spurious. We agree with the government, however, that such knowledge was not essential to its case. For beyond doubt, the loan transaction, in which the interstate wires were used, was a step in the scheme to lure Liftig into the merger: it would serve to bring the S.S. Whitehead into Continental and thus satisfy a condition upon which Liftig would bring his corporations into Continental. The loan transaction was proved beyond dispute and even if the government failed to prove that the appellant falsely represented the genuineness of the bonds, as charged in paragraph 4 of the indictment, it was enough to support a conviction if the government proved a scheme to defraud by one or more of the false representations charged in paragraph 3.

The appellant also claims fatal variances between the indictment and the proof in various trifling matters. We find no merit whatever in these claims.

Lastly, the appellant predicates error on the denial by Judge Dimock of his pre-trial motion to dismiss as a violation of his right to a speedy trial as guaranteed by the Sixth Amendment and Rule 48(b) of Fed. Rules Crim.

Proc. This point is based upon the fact that although the appellant had been arrested on December 28, 1955 on a complaint charging a violation of 18 U. S. C. §1343, he was not indicted until October 1959. Then, on October 30, 1959, having at his own request obtained an adjournment until November 4, he moved to dismiss the indictment on the ground that he had been denied a speedy trial in violation of the Sixth Amendment. This motion was denied by Judge Dimock in an opinion reported in 179 F. Supp. 645. As to this point we affirm on Judge Dimock's opinion below.

Affirmed.

APPENDIX

"The Court: At the outset, I want to commend counsel for both sides for their able presentation of this case and for their courteous demeanor during the course of this case.

Since this case was tried before me without a jury, it is my function to determine the facts and to adjudicate the ultimate question of guilt or innocence based on the law as I interpret it.

Previously, on the defendant's motion for a judgment of acquittal made at the close of the prosecution's case, I held in effect that there was sufficient evidence in the record upon which a finding of guilt could be based.

Now, at the conclusion of the entire case, after carefully considering all the evidence, I find that the government has established beyond a reasonable doubt that the defendant violated 18 U. S. C., Section 1343, proscribing the use of the wires to defraud. Thus, I find the defendant guilty as charged.

In order to establish its case, the government was required to prove:

1. That the defendant had devised a scheme to defraud by means of false representations; and

2. That he caused to be transmitted an interstate telephone call for the purpose of facilitating that scheme.

I hold that the government has succeeded in establishing both of these essential elements beyond a reasonable doubt.

Now, the scheme to defraud: That government called several witnesses in order to establish the scheme. The alleged victim, A. Mitchell Liftig, testified that in the fall of 1955 the defendant sought to induce him to merge four companies in which he had substantial interests in a then hollow corporation owned by the defendant. This corporation ultimately was known as the Continental Chartering & Shipping Corporation, and I shall refer to it hereafter as Continental.

It appears from the evidence that the defendant was in desperate financial straits at that time. This was made clear by the testimony of the witness Matthew Fox, who testified in behalf of the defendant. The defendant owed Fox between $600,000 and $700,000, and he was being pressed for repayment. If defendant were to succeed in obtaining adequate financing for his new corporation, it was urgent that the corporate assets which Liftig controlled be merged into Continental, and also the defendant was interested in obtaining for Continental the income from Liftig's companies.

The defendant, relying on the testimony of Fox, argues that his purpose was to stall Fox and to prevent Fox from selling the Whitehead Corporation before the defendant could obtain the funds to reacquire it. But the many representations were made

primarily to Liftig and only indirectly and intermittently to Fox. Fox's testimony does not indicate that the representations, for example, as to Michaelson of Alcoa, and the representative of Arthur Andersen & Company who was representing National Bulk Carriers, all of the representations concerning the representation by Attorneys Burke and Nelson, were even communicated to him at all. Further, since Fox and Fassoulis were and had been very good friends, there is no reason given why the defendant needed Liftig as an emissary to Fox. If he wanted Fox to delay, he could have made the same representations to Fox without any intercession by Liftig.

After observing the witness Fox, I consider his testimony in many respects unsatisfactory. His relationship with the defendant, even in business deals, was on an informal, friendly basis. Their business arrangements, it appears, were quite loose; despite the fact that Fox had made loans to Fassoulis of very large sums of money, Fox testified that he was not certain of the percentage interest paid or if he actually received any interest from Fassoulis. And if my recollection serves me, he testified further that he had never fixed any actual dates for the payment of interest; furthermore, that many of the loans were made without the defendant placing any collateral for such loans. Fox testified, indeed, that the defendant at the present time owes him approximately $300,000. I believe there, too, that this debt is not collateralized. Moreover, Fox frankly admitted, when pressed, of course, that he had discussed the pending case several times with the defendant personally prior to his testifying.

In the course of the few months after the meeting between Liftig and Fassoulis, the defendant made every effort toward convincing Liftig of the wisdom of a merger of Liftig's four corporations into Con-

tinental, representing that the transaction would be financially advantageous to Liftig and his associates and would make Continental an excellent subject for future income and financing. In exchange for the merger, Liftig and his associates were to receive 40 per cent of the stock in the new corporation. The defendant made a large number of false and fraudulent representations, both orally and documentary, all intended to induce Liftig to merge his companies. In this connection, the defendant it appears accurately represented to Liftig that he formerly owned the Whitehead Steamship Company which controlled a valuable Liberty ship, the SS Whitehead, and that he had pledged the stock of this corporation with Fox to secure a portion of a loan. Further, that he could reacquire the stock for Continental by repaying this debt to Fox and that he would arrange to do so. However, after these initial representations, there followed a series of fabrications intended by the defendant to create the image of an individual with sound business contact and financial substance, and so he misrepresented to Liftig that he was in the process of acquiring, and later that he did actually acquire, two charters from Alcoa, one of which was going to produce an income of $14,000 per month, while the other was to produce 12 to $12,500 per month. During one conference with Liftig, the defendant exhibited documents which he represented to be these charters.

Peter Moraites, an attorney retained by Continental, and also a government witness, corroborated the existence of these documents and their exhibition by the defendant. Liftig, Moraites and others testified to the defendant's later admission that no such charters existed and that the documents had been the figments of his imagination, prepared solely by him.

Further, Liftig testified that the defendant represented that he had acquired the Amerex Corporation, which he stated owned a valuable ship, the SS Amerosia. According to these same witnesses, this too the defendant later admitted was untrue and that there was no Amerex Corporation, nor an SS Amerosia, and this appears to be not contested here. Prior to these admissions, however, the misrepresentations were presented frequently by the defendant in different contexts.

Once it appeared that the defendant had succeeded in interesting Liftig, it was vital that the defendant keep this interest in the financial venture unabated until Liftig's four corporations were acquired. To further bait the hook, in the course of negotiations with the underwriters Gearhart & Otis, who had been consulted by the witness Purcell, also an attorney for Continental, the defendant again misrepresented that he owned the two charters and the Amerex Corporation. In addition, Purcell, if my recollection serves me, testified that the defendant had represented that he was negotiating for the acquisition of a third ship, and all of these representations were untrue. These negotiations with Gearhart & Otis were never pursued further by the defendant and were permitted to lapse.

It is to be noted that in connection with the Alcoa charters another device was used by the defendant in an effort to keep Liftig interested, and that was the statement to Liftig that he would arrange for Liftig to meet a man whom he referred to as a Mr. Michaelson, supposedly a representative of Alcoa. Several purported meetings were arranged, but while Liftig appeared, the so-called Michaelson never did appear. Each time the defendant gave spurious reasons for his failure to appear, and subsequently, as several witnesses testified, the defendant admitted that Mr.

Michaelson did not exist. And there is a stipulation on the record between counsel that if a representative of Alcoa were called to testify, he would testify that no man by the name of Michaelson was or is employed by Alcoa, and that certain alleged charters which were supposedly entered into in behalf of Alcoa were not true documents.

Further fraudulent conduct on the part of the defendant, intended to induce Liftig to string along, appears throughout this case. In this category falls the creation of an elaborate contract, Exhibit 10, which purported to involve the National Bulk Carriers, a prominent shipping company, and which contract the defendant represented would benefit Continental substantially. The defendant's machinations are further illustrated by another purported meeting between Liftig and the alleged representation of National Bulk Carriers. The defendant had told Liftig that a representative of Arthur Andersen & Company, accountants for National Bulk Carriers, would appear to represent National Bulk Carriers. At the alleged meeting place, no such representation appear d, and this alleged transaction was ultimately abandoned. Subsequently, according to the testimony, the defendant admitted that there was no such transaction, and that this too had been concocted by him.

Nevertheless, all these representations had accomplished their purpose. Liftig was growing more eager and becoming more impressed with the ability of the defendant who would be his future associate and who was giving the appearance of one able to produce lucrative business contracts.

In early December of 1955 the defendant was still looking toward the merger with Liftig's four sound companies so as to acquire a substantial basis for

obtaining future financing for Continental and to obtain the income from these companies. Liftig, induced by the defendant's many false representations, was still interested in the transaction, but would proceed only if Continental had the substance which the defendant represented, among them being the assurance of income of at least $10,000 per month from the Alcoa charter. Liftig's participation up to this time and his frequent meetings with the defendant and his selection as president of Continental and his signing of checks as president of Continental can be accounted for on no other basis except that the defendant was building up Liftig to the point where he would be ripe for the merger of the companies in which he had his interest.

At this juncture the opportunity for which the defendant had been waiting apparently presented itself. As his first step, he had to get the SS Whitehead released by Fox and the corporate stock transferred to him. So he devised the plan to tell Liftig of a man named Eichler who wished to enter into a contract with Continental on behalf of a wealthy shipping magnate named Vergottis. The defendant later admitted that Eichler did not represent Vergottis, that in fact Eichler never existed. Pursuant to this new facet of the scheme, the defendant fraudulently drafted an elaborate contract, Government's Exhibit 11, and represented that it was a contract between Continental and Eichler. As the defendant later admitted, this contract too was just another creature of his imagination. When Liftig wished to meet Eichler, the defendant arranged several meetings, but each time invented a reason why Eichler could not appear. To create an air of authenticity and, to use the language of the brief submitted by the defendant, 'to make Liftig's tongue hang out,' the defendant further falsely represented that Eichler

was being represented by Mr. O. Taft Nelson and later by Mr. Morgan Burke, both prominent attorneys, and both testifying that they had never represented a Mr. Eichler or ever heard of Mr. Eichler.

In connection with the device involving the fictitious Eichler, the defendant represented to Liftig that Eichler was to put up $800,000 of AT&T debentures which would be used to collateralize a bank loan which in turn would be used to pay Fox a portion of his loan and thus obtain the Whitehead stock. Overnight this amount was changed by the defendant to $346,000 in AT&T debentures. The transaction went through as planned, the money was borrowed, the debentures posted as collateral, and it appears that the defendant was within arm's length of reacquiring the Whitehead stock. When viewed in context, this was but another step by which the defendant hoped to induce Liftig to act on the merger, and it is clear that the plan still retained its fraudulent character. For even if the debentures had been genuine, which they were not, the defendant in order to obtain the financing and the income he desired, still required the merger of Mr. Liftig's four sound companies into Continental. Mr. Liftig's testimony is clear that in addition to the control of the SS Whitehead by Continental, a charter producing at least $10,000 a month income to Continental was a condition precedent to such a merger and that he was relying on defendant's false representation that such a charter was already in existence on a firm commitment basis.

I should note before I leave this element of the case that the defendant, in his brief submitted to me upon the conclusion of the case, has conceded on page 4, and I quote:

'And so defendant concedes that the alleged Alcoa contracts were phony; that the acquisition of the non-existent stock of Amerex and its asset the Amerosia was a myth; that the contract with National Bulk Carriers was fabricated; and that the alleged deal as presented with one Eichler was a hoax.'

Inherent in such a concession is the fact that the defendant must also agree, therefore, that the representations with respect to Burke and Nelson were fraudulent; that the alleged meetings that he was setting up with Mr. Michaelson, with Mr. Eichler, with the representative of the National Bulk Carriers were also frauds.

Now I come to the telephone call. The testimony of witnesses Rommel and Heller establishes that on the morning of December 15, 1955, a telephone call was placed by the First National Bank of Akron to the Chemical Corn Exchange Bank in New York. The purpose of the call was to make arrangements by which the loan to Continental could be obtained at the New York bank. Thus it is clear that the telephone call was necessary for the defendant's plan to be realized since without it the loan could not have been obtained and the scheme would have failed. Thus, the requirement that the interstate call be incident to the scheme to defraud (see Pereira v. United States, 347 U. S. 1, 8 (1954), was met.

It is equally clear that the defendant caused the call within the meaning of the statute. It is sufficient that the defendant knew or could reasonably have foreseen that an interstate call would be made (Pereira v. United States, supra).

The witness Moraites testified that the defendant knew on December 14th, the day before the call was made, that the money was to come from Akron with

delivery to be made in New York where the bonds were to be posted as collateral. Mr. Rommel testified that it is the ordinary custom of the banking profession in this situation for a telephone call between the banks to precede the delivery of the money. Furthermore, the defendant expected and wanted the money as soon as possible and did obtain it immediately after being advised that it was available at the Chemical Bank of New York. He certainly expected the banks to use the most expeditious means for completing the necessary arrangements. Thus the evidence shows that the defendant had every reason to foresee that a call would be made before the money could be obtained.

Thus, I hold that the two elements of the offense charged, to wit, a scheme to defraud Liftig through false representations and a telephone call caused by the defendant for the purpose of facilitating that scheme, have been established beyond a reasonable doubt, and, as I have said before, I find the defendant guilty accordingly.

Furthermore, though such a finding is not essential to my holding that the government has established the guilt of the defendant beyond a reasonable doubt, I believe without summarizing the evidence, which is complete and full in the record, that the circumstantial evidence establishes beyond a reasonable doubt that the defendant knew when he first produced the debentures and throughout the transaction that they were in fact counterfeit.

The defendant argues in his behalf that if only a scheme to defraud Liftig is established and not a scheme to defraud the two banks as well, there is a variance which is fatal to the prosecution. He also argues that since the indictment includes a scheme to defraud Liftig of his assets and the evidence indicates

that the assets, if any, which the defendant desired were owned by four companies in which Liftig had only a substantial minority interest, a fatal variance has been shown. But the law is clear that a variance is fatal only if it in some way impairs the defendant's substantial rights (see Berger v. United States, 295 U. S. 78; United States v. Sing Kee, 250 F. 2d 236, cert. den. 355 U. S. 954; United States v. Schwartz, 150 F. 2d 627, cert. den. 326 U. S. 757), and the defendant has in no way shown or attempted to show that he has been prejudiced or misled in his preparation for trial. The defendant also argues that, while there may have been fraud at the outset, the fraudulent scheme had ceased before the call was made and the loan obtained. This contention has been fully dealt with in the discussion above, and I have already held that one continuous scheme has been proven.

The defendant contends that since no one was actually defrauded and since the banks were eventually repaid, there is no basis to find a violation of the statute. But the law is clear that it is not essential that the scheme result in success to the defendant or loss to the intended victim in order for a conviction to stand up (see United States v. Feldman, 136 F. 2d 394, aff'd 322 U. S. 487, rehearing den. 323 U. S. 811; Hoffman v. United States, 249 F. 2d 338, 341).

I should say in passing that I believe the inferences to be drawn from the defendant's conduct following the appearance of the article in the New York Times which appeared on December 21, 1955, and which is an exhibit in evidence, and which article revealed the circulation of the counterfeit bonds, and I refer particularly to his activity concerning the alleged repayment to the bank and the bank's attorney and Blair & Company, so eloquently pleaded here this morning by Mr. Siegel, and his activities in connection with the

investigation into the authenticity of the bonds, are adverse to the defendant, for I believe they were motivated by a desire to allay suspicion and wrap him in an aura of innocence. It is inconsistent for him to take the position that he believed at all times that the bonds were legitimate in the light of the highly suspicious circumstances concerning his acquisition of the bonds. Furthermore, it is inconsistent for him to take the position that he cannot reveal the source of these bonds for fear of bodily harm, when indeed he did not have any fear in dealing with these people in the first instance.

So the judgment of this Court is that the defendant is guilty."